Supreme Court of the United States

OCTOBER TERM, 1968

No.

FARBENFABRIKEN BAYER A.G.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Farbenfabriken Bayer A.G. ("Bayer") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this action on June 25, 1968.

OPINIONS BELOW

The order of the United States District Court for the District of Columbia entered on May 10, 1968, is annexed hereto as Appendix A. A copy of the judgment of that court entered on May 14, 1968 (R. 1, App. A)*, amending such order is annexed hereto as

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* References to "R. ——" are to the certified record of the court of appeals, a copy of which has been filed in this Court.

Appendix B. The judgment of the court below, denying petitioner leave to appeal (R. 4), is not reported and is attached as Appendix C.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).*

QUESTION PRESENTED

The question presented is whether the Expediting Act, 15 U.S.C. § 29, precludes a court of appeals from entertaining an interlocutory appeal properly certified under 28 U.S.C. § 1292(b), especially where an immediate appeal would serve the purpose of the Expediting Act by permitting prompt decision on a jurisdictional issue that might terminate the litigation without the time and expense of trial.

STATUTES INVOLVED

The statutory provisions are:

(1) Section 2 of the Expediting Act, 69 Stat. 989 (1948), 15 U.S.C. § 29, which provides:

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* Because leave to appeal was denied by the court below, there is some question whether this case was ever "in" the court of appeals within the meaning of 28 U.S.C. § 1254(1). See *In Re 620 Church St. Bldg. Corp.*, 299 U.S. 24 (1936). Therefore, petitioner is also seeking review of the decision below by an application, filed concurrently herewith, for a common law writ of certiorari under 28 U.S.C. § 1651(a). Beginning with the "Statement," the text of both documents is identical.

"In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

(2) 28 U.S.C. § 1292(b), which provides:

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

STATEMENT *

This is a civil antitrust action brought by the United States pursuant to Section 4 of the Sherman Act in the District of Columbia. There are two named

* Petitioner believes the following abbreviated statement of facts is sufficient for this petition. A more extended statement of facts is set forth in the Jurisdictional Statement and in the Petition for Writ of Common Law Certiorari, filed concurrently herewith, which seek review of the merits of the district court's order.

defendants—Bayer and Chemagro Corporation (R. 1, pp. 2-3).

Process was served by mail upon Bayer at its offices in Leverkusen, West Germany, purportedly under the authority of 35 U.S.C. § 293, a provision of the Patent Code. Bayer moved to dismiss the complaint as to it on the ground that Section 293 did not authorize the issuance of process against it in this action. And, since Bayer was not in any way "present" within the District of Columbia, it urged that the district court had no other basis for asserting *in personam* jurisdiction over it.

By order entered on May 10, 1968, the district court denied Bayer's motion. On May 14, 1968, at Bayer's request, the district court amended that order by entering a judgment including findings appropriate to permit Bayer to appeal pursuant to 28 U.S.C. § 1292 (b).

On May 24, 1968, Bayer timely filed in the court of appeals an application for leave to appeal pursuant to 28 U.S.C. § 1292(b) (R. 1). Bayer's purpose was to get immediate appellate review of an issue which could terminate an otherwise long, costly and burdensome litigation. On June 25, 1968, the court of appeals, by *per curiam* order, denied leave to appeal (R. 4). It is apparent that the court of appeals did not exercise the discretion granted to it by Section 1292(b). The sole ground for denial of leave was the court of appeals' view that the Expediting Act deprived it of jurisdiction to entertain the appeal.*

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* The only cases cited in support of the denial of leave to appeal are *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 305

REASONS FOR GRANTING THE WRIT

This petition raises a significant federal issue of first impression. It is an issue that will have considerable impact both on the conduct of Government antitrust litigation and the allocation of jurisdiction between this Court and the courts of appeals in antitrust cases. Even though this Court has many times noted the burden that the Expediting Act places upon its jurisdiction,* it has never considered whether the enactment in 1958 of 28 U.S.C. § 1292(b), giving the courts of appeals jurisdiction to entertain interlocutory appeals, creates a machinery for expediting the conduct of antitrust cases in conformity with the policies of the Expediting Act.

The court of appeals in this case apparently concluded that the Expediting Act, enacted at the turn of the century, overrode the clear intent of Congress

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n.9 (1962); *United States* v. *California Cooperative Canneries*, 279 U.S. 553 (1929); and *National Association of Real Estate Boards* v. *United States*, 85 U.S. App. D.C. 165, 176 F.2d 631 (1949). Moreover, the only argument advanced by the Government in opposition to the application for leave to appeal was that the Expediting Act precluded court of appeals' review even of the threshold jurisdictional question.

* *United States* v. *Grinnell Corp.*, 384 U.S. 563, 565 (1966) (dissenting opinion); *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175 n.1 (1963); *id.* at 202 (dissenting opinion); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 355 (1962) (concurring opinion); *id.* at 364-65 (dissenting and concurring opinion); *United States* v. *Borden Co.*, 370 U.S. 460, 477 (1962) (dissenting opinion); *United States* v. *E. I. DuPont DeNemours & Co.*, 366 U.S. 316, 324 (1961); *International Boxing Club, Inc.* v. *United States*, 358 U.S. 242, 268 (1959) (dissenting opinion).

in 1958 to enlarge the appellate jurisdiction of courts of appeals. In so concluding, the court below relied principally upon two earlier decisions by this Court, neither of which involved consideration of 28 U.S.C. § 1292(b). Although it is settled that, *under the Expediting Act*, interlocutory orders are not reviewable in either the Supreme Court or the courts of appeals, see *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 305 n.9 (1962), that is not the issue presented here. Rather, the question is whether such orders are reviewable by courts of appeals *under the provisions of Section 1292(b)*. This is an issue which has never been decided. The court of appeals failed to comprehend this distinction and concluded that it was without jurisdiction of the appeal because of the Expediting Act. Because of that erroneous belief, the court of appeals failed to exercise the discretion granted to it by 28 U.S.C. § 1292(b)—whether or not to review the district court's judgment. The decision below thus presents a substantial issue of significant importance warranting review by this Court.

Both the Expediting Act and Section 1292(b) seek a common objective: to secure the speedy disposition of litigation. The Expediting Act, which applies only to Government antitrust cases, seeks that goal by providing for direct appeal to the Supreme Court of final judgments. Section 1292(b), which applies to all civil actions, seeks the same objective by providing for immediate review in the courts of appeals of orders not otherwise appealable that decide close and "controlling" questions if an immediate appeal may hasten the end of the litigation. The statutes are complemen-

tary, and they should be so construed; the restrictions on review imposed by the Expediting Act, enacted at the turn of the century, do not limit the jurisdiction granted to courts of appeals by Section 1292(b), enacted in 1958.

Moreover, it has been held by one court of appeals that notwithstanding the Expediting Act, courts of appeals have jurisdiction under 28 U.S.C. § 1292(a)(1) to review orders granting or denying preliminary injunctions in antitrust cases. *United States* v. *Ingersoll-Rand Co.*, 320 F.2d 509 (3d Cir. 1963). Even though Section 1292(a) contains an exception for cases "where a direct review may be had in the Supreme Court," the court of appeals exercised jurisdiction in *Ingersoll-Rand*. Section 1292(b) contains no such exception and is, therefore, a broader grant of jurisdiction.

In any event, Section 1292(b) cannot possibly defeat the speedy disposition of antitrust litigation sought by the Expediting Act. By its terms, the certification statute will not permit an immediate appeal of a certified question except upon a finding that such an appeal may "materially advance the ultimate termination of the litigation."

Expedition of the present litigation will be served by an interpretation of Section 1292(b) that permits prompt review of the district court's order. Indeed, reversal of that order will terminate the entire litigation.*

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* The district court action was commenced against Bayer by service under Section 293 of the Patent Code. Thereafter, a "proceeding" being "pending" in the United States District

In enacting Section 1292(b), Congress specifically recognized that early determination of threshold issues —such as jurisdiction—would be useful in securing expeditious determination of long and complex cases.* That purpose will be achieved in cases like this, even though the only appeal from the final judgment may be directly to the Supreme Court.

Section 1292(b) confers upon courts of appeals jurisdiction to hear certified questions in *all* civil actions. It would be ironic to regard the Expediting Act—whose very purpose was to advance the ultimate termination of proceedings—as an obstacle to the employment of this new pathway to the same goal. But that is precisely what the court below did.

Court for the District of Columbia, the Government caused process to be served in Kansas City upon Chemagro under Section 5 of the Sherman Act. If the proceeding against Bayer was not validly commenced, then service under Section 5 of the Sherman Act against Chemagro was not valid, and the action could not be maintained in the District of Columbia. Chemagro, of course, could be sued in Kansas City, where this proceeding really belongs.

* See S. Rep. No. 2434, 85th Cong., 2d Sess. (1958) p. 2.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Sept. 11, 1968

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 586-68

UNITED STATES OF AMERICA,
Plaintiff,

v.

FARBENFABRIKEN BAYER A. G., and CHEMAGRO CORPORATION,
Defendants.

ORDER ON MOTION TO DISMISS

1. This is an antitrust case brought by the United States against a German company, Farbenfabriken, and its American subsidiary, Chemagro, pursuant to Section 4 of the Sherman Act (15 U.S.C. § 4), in order to secure declaratory and injunctive relief. In its complaint, the government asserts that defendants entered into unlawful licensing agreements with over a hundred American firms, in violation of Section 1 of the Sherman Act (15 U.S.C. § 1). According to the complaint, such license agreements prevent competition in the sale of an important insecticide and they place unlawful restraints upon the alienation of the product by purchasers thereof.

2. On the basis of the foregoing facts, the Court finds that this action is one "affecting the patent or rights thereunder" within the meaning of 35 U.S.C. § 293. Moreover, the relief which the government

prays for constitutes "action respecting the patent or rights thereunder" which 35 U.S.C. § 293 gives this Court the same jurisdiction to take that it would have if the patentee were personally within the jurisdiction of the Court.

The motion to dismiss is, therefore, this 10th day of May, 1968, denied.

It is so ordered.

/s/ Edward M. Curran
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 586-68

UNITED STATES OF AMERICA,
Plaintiff,

v.

FARBENFABRIKEN BAYER A. G., and CHEMAGRO CORPORATION,
Defendants.

AMENDED ORDER ON MOTION TO DISMISS

1. This is an antitrust case brought by the United States against a German company, Farbenfabriken Bayer, A.G., and its American subsidiary, Chemagro Corporation, pursuant to Section 4 of the Sherman Act (15 U.S.C. § 4), in order to secure declaratory and injunctive relief. In its complaint the government asserts that Bayer owns a patent for diethyl and that the Bayer Patent does not cover or purport to cover the use of diethyl or the manner in which it is packaged or formulated for use or sale. The complaint further alleges that Bayer has granted Chemagro an exclusive license under the patent. The complaint asserts that Chemagro has entered into more than one hundred contracts in which it agrees to sell diethyl to the vendee and to grant the vendee a license under the patent with certain restrictions and limitations relating to the use and resale of the product by

the purchasers thereof. The complaint alleges that said contracts violate Section 1 of the Sherman Act (15 U.S.C. § 1), and that Chemagro and Bayer have continued and will continue said allegedly unlawful contracts in effect unless this Court grants the relief prayed for in the complaint. It alleges that Bayer combined with Chemagro and participated in said violation by granting an exclusive license to Chemagro, by deriving revenue from Chemagro's contracts, and by its control of Chemagro.

2. On the basis of the foregoing allegations, the Court concludes that this action is one affecting the patent or rights thereunder and that this Court has the same jurisdiction to take action respecting the patent or rights thereunder as it would have if the patentee were personally within the jurisdiction of this Court (35 U.S.C. § 293).

It is, therefore, this 14th day of May, 1968,

ORDERED: that the motion to dismiss is denied; and

IT IS FURTHER ORDERED: that, in accordance with 28 U.S.C. § 1292(b), it is the opinion of the Court that the denial of the motion to dismiss involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation.

/s/ Edward M. Curran
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1967

C. A. 586-68
United States Court of Appeals
for the District of Columbia
Circuit
FILED Jun 25 1968
/s/ Nathan J. Paulson
Clerk

No. Misc. 3277

FARBENFABRIKEN BAYER, A.S.,
Applicant,

v.

UNITED STATES OF AMERICA,
Respondent.

Before: Bazelon, Chief Judge; and Burger and Robinson, Circuit Judges, in Chambers.

ORDER

On consideration of applicant's application for interlocutory appeal, of respondent's opposition thereto and applicant's reply, it is

ORDERED by the Court that applicant's aforesaid application is denied. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 305 n. 9 (1962); *United States* v. *Cali-*

fornia Cooperative Canneries, 279 U.S. 461 (1929); *National Association of Real Estate Boards* v. *United States*, 85 U.S.App.D.C. 165, 176 F.2d 631 (1949).

Per Curiam.

Circuit Judge Burger did not participate in the foregoing order.